Nos. 02-241 & 02-516

IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE COLUMBIA UNIVERSITY, CORNELL UNIVERSITY, GEORGETOWN UNIVERSITY, RICE UNIVERSITY AND VANDERBILT UNIVERSITY IN SUPPORT OF RESPONDENTS

Floyd Abrams
Counsel of Record
Susan Buckley
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Amici Curiae

Additional Counsel Listed on Signature Page

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INTEREST OF *AMICI*

This brief is submitted on behalf of *amici curiae* Columbia University, Cornell University, Georgetown University, Rice University and Vanderbilt University in support of the respondents in these appeals.[1] Each of the *amici curiae* is a private university subject to Title VI of the Civil Rights Act of 1964.[2] Each is highly selective in its admission policy—Columbia College, for example, accepted less than 12% of over 14,000 applications for the undergraduate class of 2006. Each takes into account a myriad of factors, in addition to class rank and standardized testing results, in determining which applicants, out of thousands of superlatively qualified candidates, should be accepted. As Columbia College currently advises prospective applicants:

> The Columbia College first year class of approximately one thousand students is chosen from a large and diverse group of applicants. In the process of selection, the Committee on Admissions asks questions about each applicant's academic potential, intellectual strength, and ability to think independently. The Committee also considers the general attitudes and character of the applicant, special abilities and interests, and whether he or she is likely to make productive use of the four years in the College. In its final selection, the College seeks a diver-

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[1] This brief *amici curiae* is submitted with the consent of all parties to these actions. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief.

[2] Cornell University is a private, Ivy League research university and is, at the same time, designated as the land-grant university for the State of New York, committed to the application of basic knowledge for the public good.

> sity of personalities, achievements, and talents, and of economic, social, ethnic, and geographic backgrounds. Each applicant's academic record is examined, together with reports on personal qualities that have been supplied by the principal, the headmaster, or counselor, and by teachers. The students' records of participation in the lives of their schools and communities are also important, as is their performance on standardized tests.

COLUMBIA COLLEGE BULLETIN, available at http://www.college.columbia.edu/bulletin/admission.php.

Each of the *amici curiae* has concluded that a significant level of diversity amongst its students is essential to assure the fulfillment of its academic mission. Those missions are, of course, individualized and reflect each institution's character and history. Georgetown's commitment to diversity, for example, is rooted in its Jesuit tradition, while other *amici* have more secular origins. But each shares, from its own experience, the view of Professor Patricia Gurin, introduced in evidence in these actions, that "students who experienced the most racial and ethnic diversity in classroom settings and informal interactions with peers showed the greatest engagement in active thinking process, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."[3] Each agrees, as well, with the conclusion that

> We need to educate students to participate in a larger human culture, not just confirm their prejudices, whatever those prejudices may be. The essential contributions of pluralism to a good education are made not only through working with a variety of

[3] Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, available at http://www.umich.edu/~urel/admissions/legal/expert/summ.html.

> disciplines, teachers, and methodologies, but also through working with a variety of colleagues and peers. Anyone learns better in an environment that includes other students who bring a different background and perspective to the same experience or material. Our obligation to educate undergraduates includes assembling a diverse and heterogenous student body. This will provide the ferment and creative excitement that is itself part of a good education and will prepare them to participate in a world which promises to be very different from that any of us have experienced.

Nannerl O. Keohane, *The Mission of the Research University*, THE RESEARCH UNIVERSITY IN A TIME OF DISCONTENT 164 (Jonathan R. Cole *et al.* eds., Johns Hopkins University Press 1994).

Accordingly, each of the *amici curiae* has considered a variety of means to achieve that level of diversity in its entering classes that is required to assure the benefits to *all* students of learning in a university that is—in the words of the brief, *amicus curiae*, of the United States—"experientially diverse and broadly representative of the public."[4] All the *amici curiae* thus recruit on a continuing basis in schools with a high percentage of minority students; all have taken steps to avoid any overt or covert acts of discrimination of any sort on campus; all offer programs designed fully to integrate minority students into the university community at the same time they offer courses and extra-curricular activities that may be of particular (but not exclusive) interest to these students.

Each of the *amici curiae*, like virtually every university in the nation, has reached the conclusion that completely race-blind admissions practices frustrate or

[4] Brief, *Amicus Curiae*, of the United States in *Grutter* v. *Bollinger*, at 17.

otherwise impede its effort to achieve a sufficient level of diversity in its student body to effectuate its academic mission. As a result, each of the *amici curiae* has concluded as well that one factor amongst the multitude it considers in its admissions process should be the race and ethnic background of otherwise underrepresented minorities.[5]

Each of the *amici curiae* here agrees with and supports the arguments made by the respondents and other *amici curiae* that diversity is a compelling interest under the Fourteenth Amendment and Title VI, warranting use of ethnicity or race as one of many "plus" factors to achieve educational diversity. This brief seeks to avoid repetition of the arguments primarily addressed in the briefs of the parties and other *amici*. Accordingly, we focus on one issue only: the need for this Court to give a high level of deference to the good faith admissions decisions of public and private universities around the nation and the unconstitutional impact on academic freedom of any ruling failing to do so.

SUMMARY OF ARGUMENT

In the course of the wrenching legal and public policy debate about university admission policies that take account of race to some degree or other, little has been

[5] The admissions policies and practices of *amici* Columbia University, Cornell University, Georgetown University and Vanderbilt University are consistent with the principles of Justice Powell's concurring opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Rice University, however, currently is precluded from considering race or ethnicity as a "plus" factor in admission in order to comply with the interpretation of Title VI rendered by the United States Court of Appeals for the Fifth Circuit in *Hopwood* v. *Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

said about the First Amendment rights of the universities themselves. Academic freedom has frequently been said by this Court to be a "special concern of the First Amendment" and the right of a university to determine whom to admit has been said to constitute a central element of academic freedom. But the core question in cases such as this has commonly been phrased in an entirely one-dimensional way, just as petitioners have phrased it here, by simply asking whether a university's "use of racial preferences in student admissions violates the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 . . . or 42 U.S.C. § 1981." Petition for Writ of Certiorari in *Grutter* v. *Bollinger*, at i; Petition for Writ of Certiorari Before Judgment in *Gratz* v. *Bollinger*, at i.

What this debate has failed to recognize is that there is another constitutional provision at issue, that it is the First Amendment, and that it should be understood to *limit* the power of the government to require all universities—public and private—to adopt completely race-neutral admissions policies. The same is true of the concept that what is involved here is, in Judge Wiener's felicitous phrase, an "uneasy marriage of the First and Fourteenth Amendments"[6] which requires due consideration to the claims of both.

This brief is submitted to set forth the First Amendment side of the equation. We urge that First Amendment interests can be accommodated and Fourteenth Amendment and Title VI interests still vindicated by providing, as this Court often has, a high degree of deference to a university's good-faith determination as to how to further its academic mission. We urge specifically that when a university (especially a private uni-

[6] *Hopwood v. Texas*, 78 F.3d 932, 965, n.21 (5th Cir.) (Wiener, J., concurring), *cert. denied*, 518 U.S. 1033 (1996).

versity) determines that a constitutionally permissible goal—such as diversity within its student body—is essential to providing the highest quality educational experience for its students, any assessment of "narrow tailoring" as part of strict scrutiny analysis should reflect that deference. Consistent with the First Amendment, a university's judgment about *how* best to implement its academic mission should not be easily ignored.

ARGUMENT

As far back as this Court's landmark decision in *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), this Court has been solicitous of the independence of private colleges from governmental control. Prior to that ruling, "[i]n state after state—in Virginia, Massachusetts, New York, Connecticut, Pennsylvania, North Carolina, and, of course, New Hampshire—legislative threats to or attacks on colleges had produced at least stagnation in and often serious injury to the institutions . . . ." Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L.J. 643, 693-94 (1982).

The *Dartmouth College* case itself arose out of heated debates between the president of the college and college trustees "over the appointment of the professor of divinity, the students' attendance at chapel and local churches, and the divinity professor's services to neighboring congregations." Jurgen Herbst, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT 1636-1819, at 235 (1982). When the trustees, in the service of protecting the religious character of the college, dismissed the president, the New Hampshire legislature responded by altering the charter of the college to add new members to the board, to add a new entity with the power to veto determinations of the trustees, and to make the president and

trustees accountable to the governor and the state council. *Id.* at 236.

In his opinion for the New Hampshire Supreme Court upholding the law, Chief Justice Richardson observed that he could not "bring himself to believe, that it would be consistent with sound public policy, or ultimately with the true interests of literature itself, to place the great public institutions, in which all the young men, destined for the liberal professions, are to be educated, within the absolute control of a few individuals, and out of the control of the sovereign power." *Trustees of Dartmouth College* v. *Woodward*, 1 N.H. 111, 135 (1817). Truly "independent" trustees, he wrote, would "ultimately forget that their office [was] a public trust." *Id.*

This Court reversed, holding that the charter of a private college could not be so overcome and that a private college could not be required to serve the state's end of advancing "perfect freedom of religion." 17 U.S. (4 Wheat.) at 543.[7] As phrased by Chief Justice John Marshall:

> That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily

[7] In his oral argument on behalf of Dartmouth College, Daniel Webster urged that if "every college" were "subject to the rise and fall of popular parties, and the fluctuation of political opinions" colleges would "become a theatre for the contention of politics." 17 U.S. (4 Wheat.) at 598-99.

> become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation?

Id. at 634.

Answering those questions in the negative and holding that a college charter was a contract protected by Art. I, Section 10 of the Constitution, the Court's opinion "encouraged the development of 'private' colleges by protecting them from state interference." Mark D. McGarvie, *Creating Roles for Religion and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic*, 25 J.C. & U.L. 527, 560, 566 (1999). In doing so, the *Dartmouth College* case, one eminent scholar concluded, became "the *magna carta* of the American system of higher education . . . ." Jurgen Herbst, *Forum: How to Think About the Dartmouth College Case,* 26 HIST. ED. 342, 346 (1986).

For over a century after the *Dartmouth College* case, there was little direct conflict between government and private universities. Those universities "received virtually no state or federal support and were subjected to few governmentally-imposed legal duties." J. Peter Byrne, *Academic Freedom: A Special Concern of the First Amendment,* 99 YALE L.J. 251, 322 (1989). At the same time, the general "physical isolation of the college or university, set in a rural college town and behind the traditional college gate, reflected the more general removal of scholarly and student life from the interest or control of society at large." *Id.*; *see* Walter P. Metzger, *Academic Freedom in Delocalized Academic Institutions,* DIMENSIONS OF ACADEMIC FREEDOM 1 (Walter P. Metzger, ed. 1969).

There was no reference in so many words to academic freedom in the *Dartmouth College* case, and, indeed, no

reference to it at all in any opinion of this Court until Justice Douglas, dissenting in *Adler* v. *Board of Education*, 342 U.S. 485, 510-11 (1952), did so.[8] *Adler* itself upheld the constitutionality of the Feinberg Law, a New York statute that barred from employment in the public schools any member of an organization declared by the state's Board of Regents to advocate the overthrow of the government by force or violence. Justice Douglas's dissent argued that the New York law, with its "system of spying and surveillance . . . cannot go hand in hand with academic freedom" and that "[t]here can be no real academic freedom in that environment." *Adler,* 342 U.S. at 510-11 (Douglas, J., dissenting).

Five years later, in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), a plurality of the Court identified academic freedom as a core constitutional interest and a concurring opinion of two members of the Court—Justice Frankfurter and Justice Harlan—memorably identified the central role of academic freedom in a free society. *Sweezy* itself arose out of an investigation conducted by the State Attorney General of New Hampshire about lectures conducted at the University of New Hampshire by Professor Sweezy. After he declined to respond to certain questions, the Attorney General sought to compel the testimony. In Justice Brennan's plurality opinion, he focused on the "essentiality of freedom in the community of American Universities" and

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[8] The term "academic freedom" has not been without a level of ambiguity. Often used to articulate the rights of individual faculty members, it has more recently been used to embody the "First Amendment right of the university itself . . . largely to be free from government interference in the performance of core educational functions." Byrne, *supra*, 99 YALE L.J. at 311; *see also*, Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America,* 66 TEX. L. Rev. 1265 (1988). This brief uses the term in the latter sense.

the violation of that freedom occasioned by compelled disclosure about the substance of Sweezy's lectures.

Justice Frankfurter's concurring opinion, *id.* at 263, has been quoted, analyzed and relied upon for nearly half a century. The opinion warned of the "grave harm resulting from governmental intrusion into the intellectual life of a university" and the need for the First Amendment protection to assure "the exclusion of [such] governmental intervention." *Sweezy*, 354 U.S. at 261-62 (Frankfurter, J., concurring).[9] In its most celebrated portion, the opinion quoted with approval from a statement written on behalf of two "open" universities in South Africa—the University of Cape Town and the University of Witwatersrand—that accepted non-white as well as white students. Drafted at a time when the South African government was adopting apartheid laws enforcing segregation in the nation's universities, the statement urged that "legislative enactment of academic segregation on racial grounds is an unwarranted interference with university autonomy and academic freedom." THE OPEN UNIVERSITIES IN SOUTH AFRICA (Albert van de Sandt Centlivres *et al.* eds. 1957) 5. In the portion of the document quoted and adopted by Justice Frankfurter, it stated:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

Sweezy, 354 U.S. at 263.

Twenty-one years later, Justice Powell, in his critical concurring opinion in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311 (1978), relied upon the last of those freedoms—*i.e.*, "who may be admitted to study"—in offering his analysis of the very issue now before this Court. The attainment of a diverse student body, Justice Powell wrote, is "clearly . . . a constitutionally permissible goal for an institution of higher education." *Id.* at 311-12.[10]

Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.[11] The

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[9] The granting of a high level of institutional autonomy to universities is not an American creation. "European universities of the middle ages enjoyed extensive autonomy from both church and state, and the authority to base their corporate lives on academic values resulted in free teaching and scholarship." Byrne, *supra*, 99 YALE L.J. at 321. In the latter half of the 19th century, German concepts of academic freedom, which had considerable impact on American thinking, encompassed the principle of *Lehrfreiheit*—literally "teaching freedom"—which allowed professors "to decide on the content of their lectures and to publish the findings of their research without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof. . . ." Metzger, *supra*, 66 TEX. L. REV. at 1269.

[10] It is, in that respect, completely different from what was at issue in *Bob Jones University* v. *United States*, 461 U.S. 574 (1983)—*i.e.*, a racially discriminatory goal undermining the attainment of diversity or consideration of each person on an individual basis which "violates a most fundamental national public policy, as well as rights of individuals." *Id.* at 593. Consideration of race or ethnicity as only one of a myriad number of factors in the individualized consideration of applicants for admission in order to achieve educational diversity is a far cry from a naked goal of stereotypical racial discrimination applied without consideration of individual merit and potential.

[11] In *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), in the course of holding the Feinberg Law to be unconstitutional, this Court had observed, *inter alia*, that

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a

> freedom of a university to make its own judgments as to education includes the selection of its student body.

Id. at 312.

Then, after quoting from Justice Frankfurter's language set forth above, Justice Powell summarized with approval the university's argument as follows:

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

Id. at 313.

Justice Powell then proceeded to his twin conclusions that (a) the special admissions program at issue in *Bakke* involving an explicit racial quota could not pass Fourteenth Amendment review but that (b) race could constitutionally be considered as one factor in university admissions practices as a part of a broader review of a variety of factors determined by the university to serve its pedagogical ends.

In the years that have followed, this Court has repeatedly emphasized the need to protect the institutional autonomy of universities by deferring to their good faith judgments as to how to implement their academic missions. In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court, in the course of concluding that a public univer-

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special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Id. at 603.

sity could not exclude speech on the basis of content once the university had established a forum generally open for the use of student groups, noted that "[a] university's mission is education, and decisions of this court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* at 267, n.5. *See also id.* at 279 (Stevens, J., concurring, quoting from Justice Frankfurter's concurring opinion in *Sweezy*).

In *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), the Court rejected a due process claim of a student who had been expelled from an undergraduate medical school program, even though it assumed that the student had a property interest in continuing his studies. The Court held:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225.

Still more recently, in *Board of Regents of the University of Wisconsin System* v. *Southworth*, 529 U.S. 217 (2000), the Court concluded that a public university could constitutionally impose a mandatory student activity fee which would be used to fund a program for extra curricular student speech provided that the fund was allocated in a viewpoint neutral way. Deferring to the university's own determination as to how best to implement its pedagogical ends, the Court concluded that:

> The University may determine that its mission is well served if students have the means to engage in

> dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

Id. at 233.

Yet despite authorities such as these deferring to one after another academically-rooted decisions of universities, little heed has been paid by petitioners, their *amici* allies or even the dissenting jurists in *Grutter* to the notion of academic freedom, let alone to the idea that the view of the University of Michigan itself to determine "who may be admitted to study" was entitled to any deference at all.[12] Not only is such an approach contrary to First Amendment norms but to those embodied in principles of federalism as well. Michigan, like many other states,[13] has included in its state constitution protection for the institutional autonomy of its state university. Mich. Const. art. VIII, § 5. Michigan courts have

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12 The same is true of the jurists that joined the majority opinion in *Hopwood* with respect to the University of Texas.

13 *See* Harold W. Horowitz, *The Autonomy of the University of California Under the State Constitution*, 25 U.C.L.A. L. REV. 23 (1977); Byrne, *supra*, 99 YALE L.J. at 327 n.303 (listing state constitutions); Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 75 LAW and ED. 177, 179 (1978) (citing states with constitutionally autonomous status). In other states, the autonomy of universities is guaranteed by statute. *See* Kelly Knivila, Note, *Public Universities and The Eleventh Amendment*, 78 GEO. L. J. 1723, 1731 (1990) (citing examples). *See also*, *Maas* v. *Cornell University*, 94 N.Y.2d 87, 92 (1999) (colleges and universities are "peculiarly capable of making the decisions which are appropriate and necessary to their continued existence" and courts have " 'restricted role' in dealing with and reviewing controversies involving colleges and universities").

accordingly "consistently construed the provision as a prohibition against all attempts by the legislature to interfere with the academic management of the university." Byrne, *supra*, 99 YALE L.J. at 327.

The briefs, *amicus curiae*, of the United States offer useful examples of the consequences of failing to grant the University of Michigan or any public or private college or university anything like the autonomy required by academic freedom principles. The government concedes, with respect to the university admission process, that "[m]easures that ensure diversity, accessibility and opportunity are important components of government's responsibility to its citizens." Brief, *Amicus Curiae*, of the United States in *Grutter* v. *Bollinger* at 10. No claim is made that the University of Michigan's admissions policy fails to provide "diversity, accessibility and opportunity." Indeed, the Solicitor General's brief acknowledges that public universities need not "tolerate artificial obstacles to educational opportunity," that they have "substantial latitude to . . . ensure that universities and other public institutions are open to all and that student bodies are experientially diverse and broadly representative of the public." *Id.* at 17. But when the rubber hits the road with respect to *how* the university's "substantial latitude" may be exercised, the government's view permits little or no latitude.

Consider the Solicitor General's first example:

> [I]n Texas, which has operated without race-based admissions policies since they were invalidated by the Fifth Circuit in 1996, the undergraduate admissions program focuses on attracting the top graduating students from throughout the State, including students from underrepresented areas. See Tex. Educ. Code Ann. § 51.803 (West 2001). By attacking the problems of openness and educational opportunity

directly, the Texas program has enhanced opportunity and promoted educational diversity by any measure . . .

Under this race-neutral admission policy, "pre-*Hopwood* diversity levels were restored by 1998 or 1999 in the admitted and enrolled populations and have held steady. . . ." Thus in 1996, the last year race was used in University of Texas admissions decisions, 4% of enrolled freshmen were African Americans, 14% were Hispanic, and less than 1% were Native Americans. In 2002, 3% of enrolled freshmen were African American (this figure has fluctuated between 4% and 3% since 1997), 14% were Hispanic, and less than 1% were Native American.

Id. at 17-18 (citations omitted).

This discussion of Texas's efforts to deal with the effects of the *Hopwood* opinion is not necessarily wrong as a description of how Texas has sought to cope with the new legal reality in that state after *Hopwood.*[14] It is, however, problematic because the approach to diversity forced upon Texas in a post-*Hopwood* era is by no means necessarily right from the academic perspective *of the University of Texas itself* where the principles of academic freedom are applicable. For example, the Texas scheme is wholly dependent for its success upon the perpetuation of *de facto* segregated schools. As former university presidents Bowen and Rudenstine have concluded, "in states like Texas where the secondary school

[14] It does omit, however, that in Texas the percentage of minority students attending colleges and universities has declined significantly at a time when the percentage of minority students at the secondary school level has risen. *See* William G. Bowen & Neil L. Rudenstine, *Race Sensitive Admissions: Back to Basics*, THE CHRONICLE OF HIGHER EDUCATION (Feb. 7, 2003) at 13, n.15, available at http://www.mellon.org.

system is highly segregated, this approach can yield a significant number of minority admissions at the undergraduate level." Bowen & Rudenstine, *supra*, at 13. However, "[t]he top-x-percent plan is . . . entirely ineffective at the professional and graduate school level, because (like selective undergraduate colleges) these schools have national and international applicant pools with no conceivable 'reference group' of colleges to which they could possibly give such an admissions guarantee." *Id.* at 14.

The *amici curiae* can add to that judgment their own knowledge that at universities far smaller in size than the Universities of Texas or Michigan, the 10% across-the-board approach or anything like it is of absolutely no use at all. Such universities—many of which are private, none of which determines admissions on a purely numerical basis, and all of which have sought to further diversity on campus by taking race or ethnicity into account as one of many potential factors to be considered in the admissions process—focus *as to each applying student* on a myriad of factors which makes the Texas 10% approach—or a similar 4% figure used in California—irrelevant.[15] As Justice Powell observed of similar admissions policies, "this kind of program treats each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318 (Powell, J., concurring).

These universities are able in their admissions processes to be sufficiently selective that they routinely turn down large numbers of applicants with scores at or near the top of their high school classes. Any approach that

[15] The degree to which smaller colleges and universities take into account a wide range of factors as they make their admissions decisions is well-described in a new book describing in detail the admissions process at Wesleyan College. *See generally* Jacques Steinberg, THE GATEKEEPERS (2002).

requires the admission of *all* high school applicants who fall within the top 10% of their high school classes would require a complete abandonment of the selective admissions policies currently in effect—a result that the *amici curiae* believe would be utterly contrary to their educational missions and the institutions' academic freedom to determine who should be admitted to study.

Beyond that, the Texas approach results in a student mix that may disserve the academic ends even of a large state university by favoring a minority student in the top 10% of a less demanding school academically over a different minority student in, say, the 12th percentile of a more demanding school. This approach would not only be contrary to the interests of the university but properly be viewed as unfair; "the process is highly mechanical," students "are given automatic admission without any prior scrutiny, and without any consideration of the fact that some high schools are much stronger academically than others." Bowen & Rudenstine, *supra*, at 13-14. The impact of such a rigid regime on out-of-state applicants is equally problematic. By definition the Texas scheme would make it highly unlikely for a university to achieve a diverse mix of students from states other than Texas. Moreover, as noted above, any schemes created for state universities that enroll tens of thousands of students from within the state are wholly inapplicable to and unsuitable for small private universities that recruit students from a national pool. For example, the entering undergraduate class of 2005 at Rice University, also in Texas and also bound by *Hopwood*, is comprised of 660 students. About half of Rice's undergraduates are from Texas; the other half are from all 49 other states and various nations around the world. Given its size, Rice could not begin to accept anything like the top 1% of the high school graduates in Texas or even the valedictorian of each of the high schools around the nation from which

applications are submitted. To assemble a diverse entering class of the highest academic quality from around the nation, Rice must make a multitude of difficult choices. *Hopwood* interferes with (and indeed frustrates) that process: the 10% approach adopted by the University of Texas is simply not relevant to it.

The point, we repeat, is not that the post-*Hopwood* approach of the Texas legislature is necessarily poorly conceived. It is that in the course of the state of Texas responding to *Hopwood*, the University of Texas has been forced to take action inconsistent with its own view of its educational mission and its own judgment about how best to recruit the most academically competitive student body. Such a state-imposed "one size fits all" requirement is facially inconsistent with the core of the last of the "four essential freedoms" that a university should be free to decide for itself "on academic grounds . . . who may be admitted to study." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring).

The imposition of such a model on universities is not only at odds with the core notion of institutional autonomy of universities as articulated by Justice Frankfurter, but with the later cases cited above. The *Ewing* case is illustrative. Inconsistently with the ruling in that case, the United States offers no hint of "great respect" —or indeed any respect at all—"for the faculty's professional judgment" and no showing at all that the University of Michigan "did not actually exercise professional judgment" in reaching its decision about how best to structure its admissions process.

That sort of deference—indeed, *any* sort of deference—might not be owed if this case simply involved a typical application of strict scrutiny in the context of an alleged violation of the Fourteenth Amendment. But this case, in this unique context, as Judge Weiner observed,

"differs from the employment context, differs from the minority business set aside context, and differs from the redistricting context," *Hopwood*, 78 F.3d at 965 n.21, and potentially goes far beyond the actions of state institutions through the reach of Title VI to nearly all private universities in the United States.

The difference is that this case arises in a context which this Court has repeatedly stated implicates "a special concern of the First Amendment," one in which the very decision of universities as to "who may be admitted to study" is a long-recognized "essential" freedom. *Bakke*, 438 U.S. at 312 (Powell, J., concurring); *Sweezy*, 354 U.S. at 263 (Frankfurter, J. concurring). Given the decision of universities through the nation (including the *amici curiae*) that the goal of having a diverse campus which reflects the highest academic standards can best be achieved by taking *some* account of the racial and ethnic background of their applicants, any direction then not to do so necessarily implicates—and threatens—a core principle of academic freedom.

The First Amendment interests that encompass the concept of academic freedom are not, to be sure, the only ones present in the case. These interests must be accommodated with the Fourteenth Amendment and Title VI. But they cannot be simply ignored. Admissions policies of universities that are animated by racial exclusion or animus, *cf. Bob Jones University v. United States*, *supra*, may be entitled to no deference at all; policies that seek to serve the "constitutionally permissible goal for an institution of higher learning" of diversity through consideration of race or ethnicity as one of a myriad of "plus" factors in crafting a class, *Bakke*, 438 U.S. at 311-12 (Powell, J., concurring), should receive deference.

The implementation of a legal standard that acknowledges weighty First Amendment interests of public and private universities without unduly compromising core Fourteenth Amendment and Title VI interests is required. We suggest that it is in the application of the "narrow tailoring" element of strict scrutiny analysis that an accommodation of the competing constitutional interests should occur. It would not be unprecedented to do so. Justice Powell consciously applied a more relaxed standard in assessing narrow tailoring in his *Bakke* opinion, recognizing the significant educational interests of universities themselves.

In this case, the University of Michigan has determined that to achieve a level of diversity consistent with the university's educational mission, it was necessary to consider race as one of many factors in the admissions process. That is the same decision that public and private colleges and universities throughout the country have made for themselves, tailored by each for the accomplishment of its educational mission, since 1978. It is a decision, we submit, that must be treated with great deference, lest the judiciary be placed in the position of "substituting its judgment in this regard for those of the educators who are the custodians and guardians of the [university's] mission and academic standards." *Grutter* v. *Bollinger*, 288 F.3d 732, 771 (6th Cir. 2002).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit in *Grutter* v. *Bollinger* (No. 02-241) and the order of the United States District Court for the Eastern District of Michigan in *Gratz* v. *Bollinger* (No. 02-516) should be affirmed.

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Respectfully submitted,

Floyd Abrams
Counsel of Record
Susan Buckley
CAHILL GORDON & REINDEL
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel for Amici Curiae

Of counsel:

Elizabeth J. Keefer
General Counsel
COLUMBIA UNIVERSITY
New York, New York

James J. Mingle
University Counsel and
Secretary of the Corporation
CORNELL UNIVERSITY
Ithaca, New York

Jane E. Genster
Vice President and General Counsel
GEORGETOWN UNIVERSITY
Washington, D.C.

Richard A. Zansitis
General Counsel
RICE UNIVERSITY
Houston, Texas

David Williams, II
Vice Chancellor,
General Counsel and Secretary
VANDERBILT UNIVERSITY
Nashville, Tennessee